(4)

No. 95-1790

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED FOOD AND COMMERCIAL WORKERS LOCAL 204, AFL-CIO AND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 465, AFL-CIO,

Petitioners,

v.

THE LUNDY PACKING COMPANY, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The court of appeals denied enforcement of a bargaining order issued by the National Labor Relations Board, finding that the Board had violated Section 9(c)(5) of the Act by illegally permitting the unions' extent of organization to control the scope of the bargaining unit. The court did not order the Board to either include the unlawfully excluded employee classifications or count the ballots cast by employees in these classifications. The court took no action apart from denying enforcement of the Board's order; that is, the court set aside the Board's order in whole. The question presented is:

> Once jurisdiction vests exclusively with the court of appeals over the Board's petition for enforcement of its bargaining order, does the Board retain any jurisdiction over the underlying representation proceeding so as to permit it to take any further action absent a remand or some other affirmative instruction from the court?

PARTIES TO THE PROCEEDING

Petitioners, United Food and Commercial Workers, Local 204, AFL-CIO and International Union of Operating Engineers, Local 465, AFL-CIO, were Intervenors below. Respondent The Lundy Packing Company, Inc. was Respondent below. Respondent National Labor Relations Board was Petitioner below.

Pursuant to this Court's Rule 29.6, Respondent The Lundy Packing Company, Inc. notes that it is a privately-held corporation; it has no parent company and, except as listed below, all subsidiaries are wholly owned:

L & S Farms

L & H Farms, L.L.C.

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STATEMENT OF THE CASE

After conducting separate campaigns, United Food and Commercial Workers, Local 204, AFL-CIO and International Union of Operating Engineers, Local 465, AFL-CIO (collectively the "Unions"), filed a petition seeking *jointly* to represent certain employees of The Lundy Packing Company, Inc. ("Lundy"). This petition, filed pursuant to Section 9 of the National Labor Relations Act, gave rise to a representation case before the Board. Lundy moved to dismiss the petition, challenging the Unions' "pooling" of authorization cards solicited by one or the other, but not both, labor organizations to meet the Board's administrative threshold of interest sufficient to conduct an election. The NLRB Regional Director denied the motion and a Board majority declined review.

Lundy proposed that all affected employees be combined into an appropriate unit; the Unions sought a unit of selected production and maintenance employees. Following a hearing, the Acting Regional Director ordered an election in a fragmented unit of production and maintenance employees closely resembling the one proposed by the Unions. The Unions and Lundy sought review of this decision. A Board majority denied both appeals but directed that employees in certain positions vote challenged ballots.

The election did not produce a majority result as challenged ballots became determinative of the outcome. Moreover, Lundy filed objections to the conduct of the election and to conduct affecting the results of the election.

After investigating the challenged ballots (but not Lundy's objections), the Regional Director issued a 71 page decision adopting for the most part Lundy's position on the

challenged ballots but overruling Lundy's objections to the election. Both the Unions and Lundy appealed.

Thirteen months later a re-constituted Board issued its decision. A Board majority substantially reversed the Regional Director on the challenged ballots issue, adopted the Director's decision rejecting Lundy's objections without a hearing, and certified the Unions as the exclusive collective bargaining representative of a unit that was nearly identical to the one sought by the Unions on appeal. The Board included only one employee (out of 642) over the Unions' objections. Board Member Stephens filed a dissent which essentially adopted the ruling by the Regional Director on the challenged ballots.

The representation proceeding thus ended.

To obtain review of the Board majority's decision, Lundy refused to bargain with the Unions. This refusal precipitated an unfair labor practice charge alleging that the Company violated Section 8(a)(5) and (1) of the Act. Following summary proceedings, the Board found a violation and ordered Lundy to bargain with the Unions. Lundy's continued refusal to bargain caused the Board to seek enforcement of its bargaining order by filing a petition in the United States Court of Appeals for the Fourth Circuit. The Unions intervened.

Lundy defended its refusal to bargain on five grounds: (1) the Board improperly accepted the "joint" petition; (2) the Board illegally accorded controlling weight to the extent of the Unions' organization at Lundy; (3) a unit of all affected employees was appropriate; (4) the Board's malfeasance, coupled with the Unions' misconduct, impermissibly tainted the election; and (5) the Board's unexplained delay in issuing its decision combined with the employee turnover at Lundy

warranted denial of the petition. During oral argument, the court solicited from Lundy's counsel his view on the appropriate remedy. Lundy's counsel discussed various options with the court, including ending the case by denying enforcement of the Board's order and the alternative of remanding the case to the Board for purposes of counting the contested ballots. Lundy's counsel argued that the facts in the record fully justified a decision by the court to end the case by denying enforcement. At no time did either the Board or the Unions ever suggest that a remand for counting the challenged ballots would be an appropriate alternative disposition of the case. They were willing to stand or fall on the record before the court.

On November 3, 1995, the fourth circuit denied enforcement of the Board's order; no portion of the case was remanded to the Board for further administrative action. The court concluded that the Board had violated the Act by giving controlling weight to the extent of the Unions' organization in fashioning the bargaining unit.[1] The court did ***not*** decree that the positions at issue be included in the unit. Rather, the court held that the Board had illegally ***excluded*** them from the unit. App. 6a-8a. Nowhere in its decision did the fourth circuit direct the Board to expand the unit, or otherwise define the precise scope of the unit. Indeed, the court had before it numerous additional unit placement issues which, along with other assignments of error, were not reached. App. 11a, 27a.

The Board did not file a timely motion for rehearing. Neither did the Board otherwise seek clarification as to the

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[1] *See* 29 U.S.C. § 159(c)(5) ("[i]n determining whether a unit is appropriate . . . the extent to which the employees have organized shall not be controlling"). Neither the Board nor the Unions challenge this determination.

meaning of the phrase "*ENFORCEMENT DENIED*." The Unions, however, filed a petition for rehearing and suggestion for rehearing *en banc*, requesting a remand so that the Board could conduct "further proceedings" in which to articulate, *after the fact*, a lawful reason for excluding certain job classifications from the unit. The fourth circuit denied the motion and issued its mandate.

One month later, some three months after the issuance of the court's initial order, the Board first reacted. Following meetings with the Unions and without prior notice to Lundy, the Board "reasserted" jurisdiction over the concluded representation proceeding and "remanded" the case to the Regional Director to count some of the challenged ballots. Lundy filed a motion to stay with the Board, arguing that it was without jurisdiction to take further action. The Board rejected the motion and, upon "remand," the Regional Director issued an order scheduling a ballot count.

To prevent the Board's illegal action, Lundy filed with the fourth circuit a motion to stay the ballot count, a motion to show cause why the Board should not be held in contempt, and a petition for a writ of mandamus and prohibition. On February 15, 1996, the court ruled that "the attempt by the Board to revive the representation petition and the election that followed exceeds the Board's jurisdiction." App. 24a. The court added: "We reiterate our earlier order that enforcement of the Board's bargaining order is denied and that this case is closed in all respects." App. 24a.

Not content with that explanation, the Board filed a motion for reconsideration of the court's February 15th order in which the Board contended that the court's decision of November 3, 1995 constituted some sort of remand, or, in the alternative, that a remand was not necessary because the

court's order was interlocutory in nature. App. 27a. The fourth circuit rejected these contentions and denied the motion. The court observed:

> Numerous problems inhered in the conduct of this particular election: (1) the manner in which two separate representation campaigns were consolidated; (2) the determination of the bargaining unit; (3) the evidence of election misconduct (electioneering, intimidation, and the failure to accommodate Spanish-speaking voters); and (4) the Board's unexplained delay in issuing its decision on the challenged ballots. As a result, in *N.L.R.B. v. Lundy Packing Co.*, 68 F.3d 1577 (4th Cir. 1995), this court denied enforcement of the Board's bargaining order *outright*, disposing of the petition on the basis of the Board's improper bargaining unit determination.

App. 27a (original emphasis).

REASONS FOR DENYING THE WRIT

The Court's supervisory jurisdiction is neither necessary nor warranted in this case. There is no conflict of authority among the circuit courts on the issue presented. The Board chose not to petition for a writ of certiorari. It supports the Unions' petition only out of a vague concern of some future "uncertainty" over its authority to reopen a representation case without first seeking a remand. Bd. Br. 10. Indeed, the fourth circuit's orders do not "require any change in the Board's procedures in representation cases." Bd. Br. 9. A writ of certiorari should not issue under these circumstances. Moreover, as described below, the opinion and subsequent

orders of the fourth circuit are fully in accord with this Court's construction of the National Labor Relations Act.

The Unions' and the Board's real complaint is that the fourth circuit terminated the case without any remand. Because Congress vested that authority with the federal courts, the fourth circuit's order was precisely within statutory bounds. Cognizant of this tenet of labor law, the Unions and the Board (collectively "Petitioners") have instead constructed artful jurisdictional and separation-of-powers arguments designed to gain review. Neither the premise nor the conclusion of Petitioners' argument withstands scrutiny.

According to Petitioners, the Board retains exclusive jurisdiction over a representation proceeding which remains active unless and until the Board decides to close the matter. The Board, in other words, is free to revive a representation proceeding (which culminates with the certification of the election results) at any stage of judicial review without the consent of the court and notwithstanding its mandate.[2] Under this theory no case would end without the Board's acquiescence, and the decrees of reviewing federal courts would be subordinate to the Board's orders. Further, the Board would then have unlimited opportunities to seek enforcement of a bargaining order against the same employer but under new theories; the piecemeal litigation would end only when the Board was satisfied. Congress did not intend such a result when it enacted the statute giving reviewing federal courts

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[2]In fact, if the theory is correct, this case might have been moving in two different directions at the same time. The Board wanted to take the case back while the Unions wanted to petition for a writ of certiorari on the grounds that the fourth circuit erred in finding that the Board violated the Act. *See* Unions' Application for an Extension of Time (served 3/21/96) pp. 2-3. In this scenario, Lundy's rights and obligations would be impossible to determine.

exclusive jurisdiction. Petitioners' argument finds no support in the language of the Act or in this Court's decisions.

In addition, Petitioners are barred on procedural grounds from raising the issues presented in the application for a writ of certiorari. The fourth circuit in its November 3, 1995 order did not remand any part of the case to the Board, nor did it instruct the Board to take any action, least of all the counting of any challenged ballots. It became incumbent upon the Board or the Unions to timely file a petition for rehearing either to request a remand for the purpose of counting ballots or to obtain clarification as to whether the court's opinion permitted that action to be taken. They did not.

A. An elementary review of the Act demonstrates that the fourth circuit did not exceed its statutory jurisdiction by not remanding the case to the Board to count the challenged ballots.

The representation proceeding began when the Unions filed a petition and concluded when the Board certified the Unions as the collective bargaining representative of the unit employees. The Board's determinations on representation issues throughout this proceeding were not immediately appealable to the fourth circuit for review. Instead, the Act provides for postponed judicial review until "the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed." *Boire v. Greyhound Corp.*, 376 U.S. 473, 477 (1964). *See AFL v. NLRB*, 308 U.S. 401, 411 and n.3 (1940)(same); *ITT Lighting Fixtures v. NLRB*, 718 F.2d 201, 201 (2d Cir. 1983)(same), *cert. denied*, 466 U.S. 978 (1984). Thus an employer must first be adjudged guilty by the Board of committing an unfair labor practice in order to gain judicial review of the underlying certification order.

Lundy's refusal to bargain with the Unions resulted in a Board finding that the Company violated Section 8(a)(5) and (1), an order to bargain with the Unions, and the Board's petition for judicial enforcement of its order. Thus, the representation case and the unfair labor practice case became "as one,"[3] a final order of the Board subject to full judicial review. *Boire*, 376 U.S. at 477. The scope of review extends to all aspects of the merged case. *Id.*; *cf.* Bd. Br. 12 (court's "authority necessarily encompasse[s] the authority to review the legal and factual determinations underlying the order").

Section 10(e) provides that, upon notice and the filing of the record, "the jurisdiction of the court shall be ***exclusive***."[4] App. SA-5 (emphasis added). "There is no question that the Act intended to vest exclusive jurisdiction in the courts once the Board in the exercise of its discretion had reached its determination and applied for enforcement. This prevents conflict of authority." *International Union of Mine, Mill and Smelter Workers, Local No. 15 v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 342 (1945). It follows, therefore, that the Board no longer had jurisdiction over any aspect of the merged Lundy representation and unfair labor practice case once the agency filed the record with the fourth circuit. The Board's submission of its determination for judicial approval eliminated any "conflict of authority" between the court and the agency. *Id.*

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[3] *NLRB v. Ortronix, Inc.*, 380 F.2d 737, 739 (5th Cir. 1967).

[4] This exclusivity is illustrated by *Ford Motor Co. v. NLRB*, 305 U.S. 364 (1939), where the Board attempted to withdraw its petition after the record had been filed with the circuit court. The Court concluded that "the Board, in the presence of the court's continued and exclusive jurisdiction, remained without authority to deal with its order." *Id.* at 372.

Section 10(e) also empowers the reviewing court to "make and enter a decree . . . ***setting aside in whole*** . . . the order of the Board." App. SA-4 (emphasis added).[5] The fourth circuit exercised that authority when it denied enforcement of the Board's order. The court was under no "duty to remand." Bd. Br. 16. It must be remembered that this is not the typical case where a circuit court has found that the Board merely abused its discretion in fashioning an appropriate bargaining unit. In *Lundy* the Board acted illegally by creating a gerrymandered bargaining unit strictly at the behest of the Unions. This type of election fraud strikes at the heart of the democratic process, especially when the entity guilty of gerrymandering is the very agency charged with fairly administering the Act. Denying enforcement without a remand is the "logical and legally appropriate remedy"[6] for the Board's illegal activity.

Lastly, Section 10(e) provides that the fourth circuit's "judgment and decree shall be final." App. SA-5. This Court has previously addressed the effect of a "final" judgment of a circuit court:

> We are not dealing here with an administrative proceeding. That proceeding has ended and has been merged in a decree of a court pursuant to the directions of the National Labor Relations Act. The statute provides that if, in the enforcement proceeding, it appears that any

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[5] *See Ford Motor Co.*, 305 U.S. at 370 (the "breadth of the jurisdiction" conferred upon a court by § 10(e) includes setting aside in whole the Board's order) and at 372 (decision to allow the Board to conduct further proceedings "rest[s] in the sound discretion of the court").

[6] Bd. Br. 9.

> further facts should be developed the court may remand the cause to the Board for the taking of further evidence and for further consideration. (§ 10(e). But it is plain that the scheme of the Act contemplates that when the record has been made and is finally submitted for action by the Board the judgment "shall be final." It is to have all the qualities of any other decree entered in a litigated cause upon full hearing, and is subject to review by this court on certiorari as in other cases. (§ 10(e) supra).

Eagle-Picher Mining, 325 U.S. at 339 (footnote omitted).

It necessarily follows that the Board may not, "absent an order to remand or some express qualification in the judgment," unilaterally reopen the case and proceed on some new course. *Service Employees Int'l Union Local 250 v. NLRB*, 640 F.2d 1042, 1045 (9th Cir. 1981) (Kennedy, J.). The three challenged orders of the fourth circuit make clear that there was no remand or express invitation for the Board to reassume jurisdiction and that the entire case ceased with the court's November 3, 1995 order.

B. Contrary to the Unions' assertion, *NLRB v. Falk Corp.*, 308 U.S. 453 (1940), is not "directly on point."[7] Pet. 14. *Falk* involved a separate unfair labor practice proceeding consolidated with a representation proceeding. The employer had established a company union called the Independent. A different union, the Amalgamated Association of Iron, Steel and Tin Workers of North Carolina ("Amalgamated"), while engaged in an organizing drive, filed an unfair labor practice

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[7]Telling is the fact that the Board does not share the Unions' creative interpretation of *Falk*.

charge alleging that the company had unlawfully dominated the Independent. The Board found a Section 10 violation and petitioned the circuit court for enforcement of its order which required that the company disestablish the Independent.

Contemporaneously with its unfair labor practice charge, Amalgamated filed a petition for representation under Section 9. A third union, the Operating Engineers, intervened in the representation proceeding. The Board directed an election, placing Amalgamated and the Operating Engineers on the ballot, but excluded the Independent. No date had been set for the election pending a ruling by the circuit court in the unfair labor practice enforcement action. The representation case, therefore, had not eventuated in an unfair labor practice finding.

The circuit court enforced the Board's order to disestablish the Independent. The court, however, went on to modify the Board's direction of election to include the Independent on the ballot for the unscheduled election. This Court vacated the modification because that representation issue that was not before the circuit court.

No similarity to the facts of this case exists. The *Falk* unfair labor practice proceeding was a distinct proceeding; it did not grow out of the representation proceeding. This fact easily distinguishes *Falk* from *Lundy* in which the unfair labor practice proceeding "was merely the vehicle by which the Board's representation proceedings reached [the fourth circuit] for review." App. 23a-24a. In *Lundy*, the representation case was squarely before the fourth circuit for review.

C.

1. The Board asserts that it "***routinely*** resumes processing the representation case in accordance with the court's decision denying enforcement," citing *Medina County Publications*, 274 N.L.R.B. 873 (1985), and *Deming Division, Crane Co.*, 225 N.L.R.B. 657 (1976). Bd. Br. 10 (emphasis added). Reopening the Lundy representation proceeding was not part of any "routine" Board practice. These two cases are the most the Board's appellate counsel can identify after researching the issue for more than three months. Two decisions rendered over the course of the Board's 60 year history hardly constitutes a "routine." In any event, these cases do not support the inference that the Board has the authority to resuscitate a representation proceeding after a federal court has denied enforcement of a bargaining order.

In *Medina County* the circuit court denied enforcement of a Board bargaining order predicated on a union's election victory because the Board counted the ballot cast by a supervisor. Although the court did not remand the case, the Board did order a second election. However, the employer there did **not** contest the Board's action; instead, the employer was satisfied to proceed to another election. In fact, no new election ever occurred because the union withdrew its petition.[8]

In *Deming* the circuit court denied enforcement of a Board bargaining order predicated upon a union's election victory because of the Board's failure to consider the employer's objections to the election. Thereafter, the Board purported to direct a second election in the absence of a remand from the court. The employer objected because the Board

[8]Telephone interview with Martin S. List, Employer's Counsel of Record (May 29, 1996).

lacked jurisdiction and that the union's showing of interest was stale. The objection soon became moot. "Rather than continue with time-consuming litigation on this point, the Union withdrew its first petition for an election, obtained a fresh showing of interest, and filed a second petition for an election." *Crane Co., Deming Div.*, 244 N.L.R.B. 103, 105 (1979). For some unexplained reason, the Board failed to discuss this subsequent history of the case.

2. The Board next claims that a remand is unnecessary so long as the subsequent resurrection of the representation proceeding is "consistent with the court's decision." Bd. Br. 13. *KI (USA) Corp.*, 316 N.L.R.B. 1038 (1995), is cited for support, but similarly falls short. The circuit court denied enforcement of the Board's election-based bargaining order because the Board improperly dismissed the employer's election objection. The Board then purported to resume processing the representation case and ordered a second election. The employer was satisfied to proceed to another election and did not challenge the Board's authority to take the action. The employer prevailed in the second election.[9]

The other case cited by the Board is *A.G. Parrott Co.*, 255 N.L.R.B. 259 (1981). The circuit court denied enforcement of the Board's election-based bargaining order because of balloting irregularities. *NLRB v. A.G. Parrott*, 630 F.2d 212 (4th Cir. 1980). However, the court specifically instructed the Board to rerun the election: "it appears to us that the circumstances imperatively warrant the holding of another election, to permit a determination free of error, in which all ballots can properly be determined to be valid or invalid, and a proper decision made on the outcome. ENFORCEMENT

[9]Telephone Interview with Richard C. Hotvedt, Employer's Counsel of Record (May 29, 1996).

DENIED." *Id.* at 215 (footnote omitted). Again, for some unexplained reason, the Board failed to discuss this prior history of the case.

In summary, the Board cites a total of four cases, none from this Court or any of the circuit courts, to warrant its unilateral revival of the Lundy representation proceeding.[10] Each case is distinguishable. The Board's attempt to distinguish contrary decisions by this Court and the circuit courts is unavailing. Bd. Br. 14-15 n.11.

D. Petitioners' reliance on *South Prairie Construction v. Local No. 627, International Union of Operating Engineers*, 425 U.S. 800 (1976), and *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), to advance their "administrative usurpation" theory is misplaced. Neither case supports their position.

At issue in *South Prairie* was the employer's operation of two separate construction companies, only one of which was organized. The Operating Engineers represented the employees at the unionized business. When the non-union company began operating in the same territory as the unionized company, the union sought to extend the terms of its contract to the non-union company, arguing that the two companies were a "single employer." The employer refused to recognize the union as the representative for its non-union employees, provoking a Section 10 unfair labor practice charge that the

[10]One case is notably absent from the Board's brief. Before the fourth circuit, the Board relied upon a recent unpublished order in *BB&L, Inc. v. NLRB*, No. 93-1479 (D.C. Cir. Aug. 7, 1995). App. 27a. However, the Board in that case timely petitioned for a remand to count a challenged ballot. *BB&L* demonstrates that the Board's true routine is to seek permission from the reviewing court **before it will even consider opening challenged ballots**.

company unlawfully refused to bargain. The charge raised two distinct questions: whether the employer's two business entities were a "single employer" and, if so, whether the two groups of employees would be an appropriate bargaining unit.

The Board concluded that the two operating entities were not a single employer and, therefore, did not decide what bargaining unit would be appropriate. The union petitioned for judicial review. The circuit court concluded that the Board erred on the single employer issue. The court further decided to make the **initial** determination whether combining the two groups of employees would be an appropriate bargaining unit. This Court vacated only that part of the order, stating that for the lower court "to take upon itself the **initial** determination of this issue was incompatible with the orderly function of the process of judicial review." 425 U.S. at 805 (emphasis added and quotation omitted).

A comparison to *Lundy* is not apt. The circuit court's error in *South Prairie* was ruling on the appropriateness of the bargaining unit before the Board had exercised its discretionary authority in that area. Thus, the court had usurped the administrative function of the Board. In contrast, when the Board certified the Unions in this case and found Lundy guilty of refusing to bargain, the Board had already ruled on <u>all</u> of the representation issues raised in the case, including the challenged ballots. *See* App. 37a-50a. The representation issues were ripe for judicial review.[11]

[11]*South Prairie* reveals the irony of Petitioners' position. They repeatedly argue that the fourth circuit properly fashioned an appropriate bargaining unit by ***including*** certain employees who were illegally disenfranchised by the Board. *South Prairie*, however, prohibits the fourth circuit from fashioning a bargaining unit in the first instance; it is the province of the Board to determine an appropriate unit subject to judicial approval.

In *Pottsville Broadcasting*, this Court examined the appropriate scope of appellate review of administrative actions. In question was a writ of mandamus issued by a circuit court directing the FCC to consider the Pottsville Broadcasting license application standing alone and not in comparison with two other subsequent applications. Petitioners quote the passage, "an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." 309 U.S. at 145; Pet. 8. However, Petitioners neglect to explain that the quote comes not in the context of a circuit court terminating an appeal of a final administrative order, but rather, in the context of a remand. 309 U.S. at 145. The fact that a circuit court must respect the statutory authority of an agency when remanding the matter for further administrative proceedings does not support Petitioners' theory here that the fourth circuit was without jurisdiction to deny enforcement and terminate the case. In the case before the Court, the Board would turn Section 10(e) on its head -- the circuit court's order would be final only when the Board accepted it as final.

Eagle-Picher Mining[12] lays Petitioners' "administrative usurpation" theory to rest. In that case, the circuit court modified and enforced the Board's order finding that the company had unlawfully discharged 209 employees and directed reinstatement and back pay for them. The circuit court also adopted the Board's formula for calculating the back pay. Nearly two years later, the Board determined that a different back pay formula might have been more appropriate and,

[12]While *Eagle-Picher* did not involve review of a Board *representation* proceeding, the statutory basis for the circuit court's jurisdiction, Section 10(e), was the same as in *Lundy*.

despite interim compliance by the company, petitioned the court to vacate its earlier order to permit the new formula to be applied. The court dismissed the petition and the Board obtained review.

This Court framed the question presented as, "whether, despite a decree entered at the Board's behest, prescribing the method of enforcement of the relief granted by the Board, that body retains a continuing jurisdiction to be exercised whenever, in its judgment, such exercise is desirable and may, therefore, oust the jurisdiction of the court and recall the proceeding for further hearing and action." 325 U.S. at 339. "The petitioners' contention is that the nature and extent of the back pay remedy are primarily and peculiarly matters lying within the administrative discretion of the Board, and that a court's function is limited to imparting legal sanction." *Id.* at 340 (citations omitted). This Court, expressing concern that administrative flexibility not overwhelm the important principles of judicial certainty and finality, described the Board's theory as follows: "If the petitioners are right, it must follow that in any case in which the court refuses to remand, the Board need merely wait until the 'final' decree is entered and then proceed to resume jurisdiction, ignore the court's decree, and come again to it, asking its imprimatur on a new order." *Id.* at 341. But, as this Court made clear, the Board is not vested with the power to modify its orders once a federal court attains jurisdiction. "We are not dealing here with an administrative proceeding. That proceeding has ended and has been merged in a decree of a court pursuant to the directions of the National Labor Relations Act." *Id.* at 339.

The fourth circuit's orders simply do not preclude the Board from effectuating the purposes of the Act. The UFCW and/or the IUOE may begin a new organizing campaign and, if sufficiently supported by Lundy employees,

petition the Board for an election. Acquiescing in the court's order and learning from its past mistakes, the Board may then fashion an appropriate bargaining unit, without letting the petitioning union or unions dictate its scope, and afford all affected employees their statutory right to vote.

E. Following the fourth circuit's November 3, 1995 order, the Board did not request a remand but waited as the Unions alone filed a timely petition for rehearing, presumably so that, although their interests are identical in this regard, the Board's position would not suffer judicial rejection. When the court denied the petition, the Board simply proceeded to conduct further proceedings on its own initiative in a failed "end run" around the court's mandate. As explained in the court's order of February 15, 1996, "the Board had no such authority." App. 28a. The Board then petitioned for a rehearing, purportedly of the February 15th order, arguing that a remand was not jurisdictionally necessary or, in the alternative, that the November 3rd order constituted some sort of implied remand.

The fourth circuit properly viewed the Board's petition as an untimely petition for rehearing of the November 3rd order. The Board is a sophisticated and seasoned litigator that knows how to follow appellate rules to obtain reconsideration or clarification of orders. It is not entitled to preferential treatment unlike that granted to any other party. Because the substance of Petitioners' argument here relates only to the alleged jurisdictional dispute between the Board and the fourth circuit and that issue was not properly preserved by a timely petition for rehearing, the argument has been waived and is not available for review by this Court. A petition for a writ of certiorari is no substitute for a timely petition for rehearing.

Finally, Petitioners' newfound feelings of paternalism toward employee voting rights is profoundly hypocritical given the facts of this case. The Board unlawfully disenfranchised those who voted challenged ballots and prohibited Lundy's truck drivers, garage employees, the receiver, and dozens of other classifications from voting. With its unclean hands, the Board is not entitled to invoke the mantra of employee rights to cover its illegal acts. Rank and file employees may look to the Board for the protection of their voting rights, but in this case that protection was subordinated to the desires of the Unions.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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